Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In Re

CHAR YIGH MARINE (PANAMA) S.A.

Petitioner

PETITION FOR WRIT OF MANDAMUS / CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the Ninth Circuit Court of Appeals ignore Federal Rule of Civil Procedure 25(c), its own published precedent on that Rule, and its own published 1990 decision in the present case, and sustain a 1992 District Court judgment of $1 million against Char Yigh Marine (Panama) S.A. on the grounds that Char Yigh lacks capacity to protect itself by reason of a corporate dissolution during the litigation?

PARTIES TO THE PROCEEDING

RULE 29.1 LIST OF PARENT AND SUBSIDIARY COMPANIES

The parent company of Petitioner Char Yigh Marine (Panama) S.A. is SB General Leasing (Hong Kong) Co., Ltd. There are no affiliate or subsidiaries of the Petitioner.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

In Re

CHAR YIGH MARINE (PANAMA) S.A.

Petitioner

PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

Petitioner Char Yigh Marine (Panama) S.A. respectfully prays that a writ of mandamus issue to the United States Court of Appeals for the Ninth Circuit to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the Ninth Circuit Court of Appeals to vacate its Not for Publication Memorandum Decision of March 8, 1995 and to reconsider the issues in this matter in light of F.R.Civ.P. 25(c) and the published opinions in *Hilbrands v. Far East Trading Company, Inc.* (9th Cir. 1975) 509 F.2d 1321 and *United States for the use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549, *aff'd on reconsideration* (9th Cir. 1971) 444 F.2d 1143, and *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453 at n.6, *modified* (9th Cir. 1990) 918 F.2d 1476.

Alternatively, if this honorable Court should deem this a suitable matter for a writ of certiorari, it is requested to issue an appropriate writ of certiorari to the same court to review the Not for Publication Memorandum Decision of March 8, 1995, identifying Interpool Limited, plaintiff, as respondent.

OPINIONS BELOW

1. The Not for Publication Memorandum of March 8, 1995 of the Ninth Circuit Court of Appeals has not been published. It is reproduced herein as Appendix A1-5.

2. The interlocutory opinion of the Ninth Circuit Court of Appeals in this matter was published at 890 F.2d 1453 (9th Cir. 1989) and was modified and the modifications published at 918 F.2d 1476 (9th Cir. 1990). The full opinion with modifications is reproduced herein as Appendix B1-19.

JURISDICTION

Plaintiff brought suit in admiralty alone, pursuant to F.R.Civ.P. 9(h) and 28 U.S.C. § 1333(1) in the District Court for the Central District of California in August 1984. Defendant Char Yigh Marine (Panama) S.A. was dismissed from the case with prejudice on 22 November 1991, but was ordered to continue as a third-party claimant. On 17 January 1992 the District Court granted summary judgment for $1 million against Char Yigh Marine (Panama) S.A. A timely appeal from that judgment was filed to the Ninth Circuit Court of Appeals.

A Not for Publication Memorandum issued from the Ninth Circuit on 8 March 1995 affirming the judgment of 17 January 1992 and remanding for further proceedings to calculate interest. A timely petition for

reconsideration was filed, and denied by order of 12 April 1995.

The Court's mandamus jurisdiction under 28 U.S.C. § 1651(a) is sought under Supreme Court Rule 20, inasmuch as the extraordinary situation has arisen where, in violation of mandatory procedures, the Ninth Circuit has refused to apply F.R.Civ.P. 25(c) or its own published precedent.

If this is a proper vehicle for certiorari under Supreme Court Rule 10.1(a) (that a United States court of appeals . . . has so far deviated from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision), this petition for certiorari is filed within 90 days of 12 April 1995 and is timely under Supreme Court Rules 13.1 and 13.4. The jurisdiction of this Court is then invoked pursuant to 28 U.S.C. § 1254(c).

SYNOPSIS

After seven years of very active litigation, in 1992 the District Judge dismissed Char Yigh (a dissolved Panamanian corporation) *sua sponte* for "lack of capacity" under F.R.Civ.P. 17(a) — and ordered Char Yigh's $1 million bond forfeited to plaintiff without trial.

In fact, F.R.Civ.P. 17(a) is the wrong federal rule. Because the corporate dissolution of Char Yigh occurred after Char Yigh had appeared and answered, the correct federal rule is F.R.Civ.P. 25(c): *Hilbrands v. Far East Trading Co., Inc.* (9th Cir. 1975) 509 F.2d 1321. Under Rule 25(c), it was reversible error to dismiss Char Yigh for lack of capacity.

The Ninth Circuit affirmed the District Judge's erroneous ruling in a "Not for Publication Memorandum" that refused to apply F.R.Civ.P. 25(a) or its own published precedent (Appendix A). The Not for Publication decision here is made more anomalous still because an earlier published decision in this very case held that Char Yigh had capacity to defend after its dissolution (Appendix B8, n.6).

Subsequent to the District Court decision here, another plaintiff, suing Char Yigh before another District Judge in the same District, moved to dismiss Char Yigh on the basis of lack of capacity under F.R.Civ.P. 17(a). That second District Judge ruled that Char Yigh had legal capacity (Appendix G). That decision is now on appeal.

Not for Publication decisions are entitled to collateral estoppel effect under Ninth Circuit Rule 36-3. Defendant believes it is probable that the reasoned opinion of the second District Judge will be summarily reversed unless this Court instructs the Ninth Circuit in this case to address published precedent on F.R.Civ.P. 25(c).

STATEMENT OF THE CASE

Plaintiff Interpool Limited is a Bahamian corporation which, in the years prior to 1984, entered into a series of contracts with a group of Taiwanese, Panamanian and Hong Kong corporations to sell and to lease a very large number of truck chassis and cargo containers to the group's subsidiaries. The group of lessees operated an international cargo carrying business using ships, railroads and trucks under the umbrella name of C.C. Line.

In 1984 C.C. Line was unable to pay its equipment rental to Interpool, and entered into a confession of judgment to pay $1,321,863, together with a schedule of

payments. It then defaulted on that schedule so, in July of 1984, Interpool filed suit in New York on the confession of judgment and obtained a judgment of $1,181,863 against the various C.C. Line entities (Appendix C).

C.C. Line then went out of business, and Interpool and a large number of other creditors engaged in a flurry of litigation. In Los Angeles, in the Central District of California, Interpool sued C.C. Line *in personam* and, in a separate series of cases, Interpool and other lessors arrested the vessel C.C. SAN FRANCISCO *in rem* for tens of millions of dollars of unpaid lease payments. (Eventually, in *Foss Launch & Tug Co. v. C.C. SAN FRANCISCO*, (9th Cir. 1987) 808 F.2d 697, all these arrests were set aside for lack of maritime lien status, although the panel did hold that a contract for supply of containers to a vessel was a maritime contract).

Interpool amended its complaint here against C.C. Line to allege that Char Yigh Marine (Panama) S.A. was a contract guarantor to Interpool of the C.C. Line obligations. Using that allegation, Interpool compelled Char Yigh to file a $1 million bond to release its vessel, C.C. SAN FRANCISCO. The bond remains in effect, and is the focus of this litigation. The bond requires a finding of the extent of C.C. Line's attachable interest in C.C. SAN FRANCISCO, and a judgment after appeal against any of the C.C. Line defendants in this case.

Char Yigh appeared, and answered the complaint in October 1984. All remaining defendants were reportedly served, and their defaults were taken. Interpool then filed statements under oath that its damages were $7,934,850.00 and obtained *ex parte* default judgments for that sum against the defaulting defendants.

Thereafter Char Yigh's investigation disclosed that prior judgments on the same contracts against the same defendants existed in Interpool's favor in the Southern

District of New York. Char Yigh moved to set aside the default judgments and to dismiss the present case on merger by judgment grounds with reference to the Southern District of New York judgment of July 1984. The motion to set aside the default judgments was granted; the merger by judgment motion was denied and was preserved for appeal.[1]

During the proceedings on March 30, 1995, Char Yigh, a Panamanian corporation, filed a certificate of dissolution in the Panamanian official record. This was reported to Judge Curtis by Char Yigh in Answers to Interrogatories (Appendix D9) as follows:

> "The effect of dissolution is to alter the status of these members of the Board of Directors at the time of dissolution into trustees of the affairs of Char Yigh. Under Panamanian law, trustees have power to continue to deal with all matters pertinent to the winding up of the affairs of Char Yigh, including this litigation, for as long as is necessary after the institution of dissolution proceedings."

Interpool was, in its turn, engaged in multiple motion practice, and sought to increase the amount of the bond from $1 million to $7.9 million, and to require an independent unserved party (SB General Leasing, Japan) to post this new security. In denying these motions Judge Curtis determined he had been wrong to conclude that a right to security existed — so he vacated his order (but not the security), and certified the question for interlocutory appeal. All further activity was stayed pending

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[1] The merger by judgment issue remains vital because Interpool advises that its Southern District of New York judgment has since been satisfied in full.

the outcome of the interlocutory appeal, which was limited to the "right to attach."

The unanimous ruling of the Court of Appeals was that Interpool had alleged a theory on which a right to attach order could issue, but that Judge Curtis had not completely determined whether a right to attach order should issue. The case was remanded for a determination whether a right to attach order should issue, and for trial: *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.*, (9th Cir. 1989) 890 F.2d 1453 *modified* (9th Cir. 1990) 918 F.2d 1476 (Appendix B). On remand, the case was transferred to the calendar of Senior District Judge Irving Hill since Judge Curtis had retired.

As part of the interlocutory opinion, the panel had found: "Char Yigh was dissolved while this action was proceeding (Panamanian law allows the continued defense of litigation after dissolution) and thus has no assets with which to increase Interpool's attachment security." *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453, 1457, n.6. It was clear that the $1 million bond was alone at stake and that Char Yigh had capacity to defend it.

As a result of admissions made by Interpool in the interlocutory appeal that Interpool had never had a cause of action in August 1984 against defendant Char Yigh, Judge Hill dismissed Char Yigh as a defendant, with prejudice, on November 22, 1991, but refused to exonerate Char Yigh's security.[2]

Inasmuch as Char Yigh was dismissed with prejudice as a defendant, but had a $1 million bond still at stake, he authorized Char Yigh to file a "third party claim" (a California attachment pleading) before the next hearing,

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[2] No formal order of dismissal was signed, but the Court's docket sheet confirms that dismissal was ordered that day.

to protect its interest in its bond. In this November hearing, Judge Hill raised a question of capacity: "Something in the papers leads me to believe that Char Yigh is not even an existing entity at this time." Thereafter, Interpool moved for summary judgment, but not on issues of capacity. Char Yigh filed objections, and Interpool in its reply papers (on December 26, 1991) objected to Char Yigh's "capacity" for the first time in seven years of litigation. No formal motion was ever made.

On January 10, 1992, Char Yigh filed its "Involuntary Claim" as required by Judge Hill in November 1991. Paragraph 1 of that claim (Appendix E3) states:

> "Involuntary Third-Party Claimant CHAR YIGH at all relevant times prior to March 30, 1985 was a foreign corporation extant and existing under the laws of the Republic of Panama. **CHAR YIGH, having been dissolved under the laws of the Republic of Panama, now acts through trustees** with the intent of protecting and preserving the initial corporate assets, and of recovering damages and costs of defense from Interpool. Inasmuch as this proceeding was brought prior to the dissolution of CHAR YIGH, and has been contested by CHAR YIGH during and within three years of its dissolution, no prescriptive period applies to the defense of this action, and CHAR YIGH possesses legal capacity to defend and to prosecute its interests. Subject to the affirmative defenses below that no service has been properly made, service

> by mail of all subsequent pleadings in this action may be made on Williams Woolley Cogswell Nakazawa & Russell, 200 Oceangate, Suite 700, Long Beach, California 90802-4333, attention David E. R. Woolley." (Emphasis added.)

Prior to the hearing, Char Yigh filed a memorandum and obtained a statement under oath from Panamanian counsel that, under Panamanian law, Char Yigh (or its trustees in Char Yigh's name) were allowed to continue litigation pre-existing the dissolution. Judge Hill refused to read this declaration, and struck the filing.

At the hearing on 13 January 1992, Interpool submitted declarations of its personnel as to the character of the contracts, that they were breached on August 1, 1984 and that damages of $5,768,366.49 had been incurred.[3]

Judge Hill entered default judgment for $5,768,366.49 against the 23 C.C. Line defendants in default, plus interest. He then declared that Char Yigh lacked legal capacity to appear or defend, struck Char Yigh's third party claim (which he had in November instructed be filed), and then entered summary judgment for $1 million against non-defendant Char Yigh without interest (Appendix F). At this single hearing in 1992, the District Judge, without formal motion and despite a published opinion (Appendix B), denied Char Yigh further capacity to appear under F.R.Civ.P. 17, refused leave for its trustees to appear on its behalf and struck their pleadings.

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[3] Interpool's sworn contract damages are variously $1,181,863, $7,934,850, and $5,768,366.49. Char Yigh cannot explain the different figures because Interpool has consistently refused to attend deposition.

Char Yigh and Interpool each appealed to the Ninth Circuit. Char Yigh appealed the entry of the $1 million judgment against it inasmuch as it had earlier been dismissed with prejudice. It appealed the ruling that it "lacked capacity to defend" under F.R.Civ.P. 17(a). It also appealed the earlier denial of its motion to dismiss for merger by judgment. Interpool appealed the refusal to order non-party SB General Leasing to post a $5.7 million bond, and the denial of interest on Char Yigh's $1 million judgment and bond.

During the appellate process, Char Yigh moved to dismiss for lack of admiralty subject matter jurisdiction on the grounds that the description of the lease contracts in the 1992 motion for summary judgment identified them as terrestrial leases of truck chassis and containers to corporations, and not as leases of containers to ships. Interpool opposed. The Ninth Circuit motion panel referred decision on the motion to the panel hearing the appeal.

A Not for Publication Memorandum decision issued from the panel hearing the appeal on March 8, 1995. The Memorandum did not address the subject matter jurisdiction motion or any of the issues raised on appeal by Char Yigh except for "lack of capacity." The Memorandum held that Judge Hill "correctly determined that Char Yigh Marine (Panama) S.A. was without capacity." The panel did not address F.R.Civ.P. 25(a), the *Hilbrands* case or the *Acme Granite* case except to state in a footnote that application of F.R.Civ.P. 25(a) had been waived.[4]

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[4] Char Yigh concedes that the specific invocation of Rule 25(c) was belated, because Judge Hill had invoked Rule 17. Rule 25 was expressly invoked, with applicable case law, before the final ruling, and was not waived. The initial problem arose because spontaneous judicial rulings do not require the careful statement of thesis and antithesis that invigorates and validates formal motion practice. The

(continued)

The panel did not address its statement in the reported interlocutory opinion in this case that "Panamanian law allows the continued defense of litigation after dissolution." The panel found that no local rule of the Central District of California or federal rule forbade the district court from considering the capacity argument as raised (apparently overlooking the *res judicata* and law of the case effect of footnote 6 of its published opinion, Appendix B hereto).

The decision of the Memorandum was that "Judge Hill's summary judgment filed on January 17, 1992 against Char Yigh is affirmed" — despite the fact that on November 26, 1991 Judge Hill had dismissed Char Yigh with prejudice. Such a ruling is fundamentally illogical.

The Not for Publication Memorandum conflicts with Federal Rules, this Court's jurisprudence, the Ninth Circuit's prior reported precedent and the same panel's earlier published ruling in this very case. But it gets worse.

In August 1984, a stevedore and terminal operator, Crescent Wharf, arrested C.C. SAN FRANCISCO *in rem* in the Central District of California and secured a $334,000 bond. That case proceeded to trial before a different District Judge in August and September 1993, while the present case was on appeal. By motion *in limine* at trial, plaintiff invoked District Judge Hill's ruling as to Char Yigh's lack of capacity to defend. Briefing was held and declarations of Panamanian counsel filed. The trial court took the matter under

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(fn. continued)
present problem has arisen because the panel here has refused to follow its own known precedent in violation of the basic rule of *Elder v. Holloway* (1994) __ U.S. __, 127 L.Ed.2d 344, 114 S.Ct. 1019, that a court engaging in review of questions of law should use its full knowledge of its own precedents. The applicability of F.R.Civ.P. 25(c) or Rule 17(a) is a simple question of law.

submission; in its final findings of fact and conclusions of law, this second District Judge, Judge Kenyon, being fully apprised of Senior District Judge Hill's ruling, held that Char Yigh had legal capacity to defend.

That case was then appealed so that there is another case on appeal involving Char Yigh Marine (Panama) S.A.: *Crescent Wharf, etc v. C.C. SAN FRANCISCO*, Ninth Circuit case 94-55830. At a Ninth Circuit settlement conference in that case, counsel for Crescent has advised that he intends to invoke the Not for Publication Memorandum to take advantage of the ruling on lack of capacity. Crescent's counsel wishes to invoke the Memorandum as collateral estoppel; and briefing in the appeal in 94-55830 has been stayed so that he may have that opportunity. Because of Ninth Circuit Rule 36-3 that a Not for Publication Memorandum may be used as collateral estoppel, Crescent's counsel in 94-55830 can avoid the district court's contrary ruling.

Inasmuch as Char Yigh is present in both cases, the Ninth Circuit will be faced with two, quite irreconcilable choices — either to adopt its published ruling in *Interpool* (Appendix B) that Char Yigh had capacity to defend (and thus silently overruling its Not for Publication Memorandum, Appendix A) or to adopt the Memorandum as collateral estoppel, disregarding its published findings. Since collateral estoppel is available against a defendant as to a point of law which he previously lost, Char Yigh faces substantial jeopardy here. However, inasmuch as the Not for Publication Memorandum is by definition not published, collateral estoppel would have to be applied in a further Not For Publication opinion, lest it be seen to contradict the published ruling in *Interpool*. This is an example in actual practice of the confusion that has been created by promulgating, by Memorandum, a novel legal principle that is in conflict with published opinions of the promulgating court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has refused to apply the mandatory provisions of F.R.Civ.P. 25(c) or its own published precedent to the actions of the District Judge below and, in that process, has declared after 11 years of litigation that petitioner Char Yigh must forfeit its $1 million bond to plaintiff Interpool even though the District Court has dismissed Interpool's case for damages against Char Yigh with prejudice.

The duty to follow published precedent is not discretionary within the Ninth Circuit. A panel is bound by decisions of prior panels unless an *en banc* decision, Supreme Court decision, or subsequent legislation undermines those decisions: *Montana v. Johnson* (9th Cir. 1984) 738 F.2d 1074, 1077; *U.S. v. State of Washington* (9th Cir. 1989) 872 F.2d 874 at 880. No such intervening circumstances exist in this case, and the panel is compelled to follow its prior *Acme Granite* and *Hilbrands* decisions. Furthermore, the very same panel of judges which wrote the published *Interpool* opinion in 1990 that Char Yigh has capacity to defend has disregarded its statement in reaching its Not for Publication decision here that Char Yigh does not have capacity. This is not permitted.[5]

Likewise, the duty to apply the appropriate federal rule is not discretionary:

> "These rules govern the procedure in the United States district courts in all

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[5] The interplay between published and unpublished decisions in the same case is undecided, because Not for Publication rulings are a novel development. A simple rule can be stated that an unpublished opinion should adhere to the findings of a published opinion. If the published reasoning is erroneous, it should be publicly abrogated. If it is correct, then it should be followed.

> suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." F.R.Civ.P. 1.

As this Court has said, in the context of a summary dismissal: "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as that may be on occasion." *Surowitz v. Hilton Hotels Corp.* (1966) 383 U.S. 363, 373, 86 S.Ct. 845, 15 L.Ed.2d 807.

The fundamental purpose of the Federal Rules has been disregarded in this case. If the decision is permitted to stand, a defendant who has already been dismissed with prejudice will be forced to forfeit a $1 million bond to a plaintiff whose judgment has already been satisfied. This circumstance arises only because the Ninth Circuit refuses to apply the mandatory federal rule and refuses to acknowledge its own four-square precedent. In the exercise of its supervisory power, this Court should tell the Ninth Circuit to think again.

1. The Law is Not Being Obeyed

F.R.Civ.P. 25(c) governs this case, and requires that Char Yigh be allowed to continue to defend. This is not a matter within the discretion of the District Judge nor, in light of published Ninth Circuit precedent exactly on point requiring reversal of the District Judge's decision here, is it a matter in which the Court of Appeals has discretion to affirm the District Judge. It is a matter of adhering to the mandatory rules of procedure as promulgated by this Court.

Federal Rule of Civil Procedure 25(c) states:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Federal Rule of Civil Procedure 25(c) gave Judge Hill three choices — to allow Char Yigh to remain as defendant, to allow the trustees to substitute for Char Yigh (which was the point of the Involuntary Third Party Claim that was also stricken), or to have both in the case. Rule 25(c) did not give Judge Hill the power to dismiss the case, or to enter a spontaneous involuntary default judgment.

The application of this rule to corporations is clearly set out in a standard federal hornbook, with reference to this Court's own rulings.

> "If an interest has been transferred prior to commencement of the suit Rule 17, requiring that an action be brought in the name of the real party in interest and defining capacity to sue and be sued, is controlling. After suit is brought, Rule 25 becomes the relevant provision. The rule applies to ordinary transfers and assignments, as well as to corporate mergers.
>
> "If a corporation is wholly dissolved, rather than merged into some other entity, the matter is more complicated. The Supreme Court has said:

> 'most courts have held that the dissolution of a corporation works an abatement of pending actions.'
>
> " 'But a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing.' (*Defense Supplies Corp. v. Lawrence Warehouse Co.* (1949) 336 U.S. 621, 634-5, 93 L.Ed. 931, 69 S.Ct. 762.)
>
> "The effect of corporate dissolution during the pendency of an action, therefore, must be determined by statutory law, which usually will be that of the state. If the substantive law allows the action to continue against the dissolved corporation or against those whom its assets have been transferred, Rule 25(c) becomes applicable." 7C Wright, Miller, Kane, Federal Practice and Procedure, Civil 2d Ed. 1986, § 1958 Transfer of Interest, pp. 553-554.

Panamanian law was stated to the Court (Judge Curtis) in 1986 in sworn answers to interrogatories signed by a trustee of Char Yigh (Appendix D). Judge Curtis accepted it.

> "Under Panamanian law, trustees have power to continue to deal with all matters pertinent to the winding up of the affairs of Char Yigh, including this litigation, for as long as is necessary after the institution of dissolution proceedings."

This law was then adopted as *res judicata* and law of the case by the Ninth Circuit in 1989 when Char Yigh was dissolved while this action was pending: "Panamanian law allows the continued defense of litigation after dissolution." *Interpool Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453 at 1457 (Appendix B).

It was then also declared to Judge Hill in 1992:

> "CHAR YIGH, having been dissolved under the laws of the Republic of Panama, now acts through trustees with the intent of protecting and preserving the initial corporate assets, and of recovering damages and costs of defense from Interpool."

Panamanian law is clear even though Judge Hill rejected the record out of hand and disregarded the Circuit's "law of the case" statement. Char Yigh continues, in the "time-honored" fashion, to have "enough life remaining to litigate its actions."

The Memorandum ruling sustaining Judge Hill is in error, and the correct rule is stated in *Hilbrands v. Far East Trading Company, Inc.* (9th Cir. 1975) 509 F.2d 1321 at 1323. In that case, Mrs. Hilbrands was injured and sued her tortfeasor in District Court. After her suit was begun, she received a worker's compensation award. The tortfeasor then successfully obtained a summary judgment against her under F.R.Civ.P. 17(a) on the grounds that the compensation award had deprived her legal capacity to sue. The Ninth Circuit reversed.

> "The district court erred when, relying on Rule 17(a) F.R.Civ.P., it concluded Mrs. Hilbrands could not continue as plaintiff and granted summary judgment against her. Rule

> 17(a) would control if an interest was transferred prior to the commencement of the suit. Rule 25(c) F.R. Civ.P. applies if the transfer occurs during the pendency of the action. [citations omitted] Here the transfer occurred when Mrs. Hilbrands received her award from the Commission, which event occurred after the suit had been commenced. Thus Rule 25(c) governed."

Hilbrands, 509 F.2d at 1323.

The effect of Rule 25(c) in this case is demonstrated vividly by a Ninth Circuit case exactly on point: *United States for the use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549, *aff'd on reconsideration* (9th Cir. 1971) 444 F.2d 1143.

In that case, Rich was the prime contractor (akin to Interpool here). It had two subcontractors, B & G (akin to C.C. Line) and Acme Granite (and Char Yigh is in Acme's position). Acme's surety posted a bond in Rich's favor (and Char Yigh's surety has posted a $1 million bond in favor of Interpool).

B & G's work was inadequate, causing Acme to delay in its own performance to Rich. It appears that B & G defaulted (just like C.C. Line) and so Rich and Acme engaged in litigation. As a result of a jury trial, judgment was entered for Acme and against Rich. (In the present case, after seven years of litigation, in November 1991, Interpool dismissed its suit against Char Yigh with prejudice.)

However, because Acme had dissolved during the litigation, the District Court determined that Acme had no capacity to defend its bond (just like Char Yigh). There was no successor corporation, but the two original

stockholders sought leave to appear — and were denied (just as Char Yigh's trustees were). The District Court therefore defaulted Acme and entered a new judgment in favor of Rich to be paid from the bond (and this is exactly what happened to Char Yigh).

The District Court was reversed on appeal for failing to apply F.R.Civ.P. 25(c) as it was intended to be applied. The Ninth Circuit emphasized that dismissal in such circumstances totally destroyed "valuable property rights" and was at odds with common sense. The opinion was scathing and explicit: a dissolved defendant should always be allowed to substitute in its successor, if at all feasible. *United States for use of Acme Granite & Tile Co. v. F.D. Rich Company, Inc.* (9th Cir. 1970) 437 F.2d 549 at 553.[6]

The Acme Granite case has a further point of interest. The Court was particularly attentive to the rights of the victimized bondsman, Fireman's Fund:

> "Fireman's Fund, as surety, is entitled to due process. The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders": 437 F.2d at 553.

Fireman's Fund appears in the *Interpool* case as plaintiff, when it appeared as surety in *Acme Granite*. (It is believed and so asserted that Fireman's Fund has paid, and is subrogated to, Interpool's rights in this case.) Accordingly, the doctrine of issue preclusion applies

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[6] On reconsideration it was affirmed that federal courts have ample authority to dispose of cases on their merits by the substitution of parties as necessary, even if the underlying state procedural law would have abated the action by the dissolved corporation: 441 F.2d at 1144.

against Fireman's Fund/Interpool, to prevent it from contesting the aptness of the result in *Acme Granite* or its application here: *Parkland Hosiery Co. v. Shore* (1979) 439 U.S. 332, 58 L.Ed.2d 552, 99 S.Ct. 645; *Kim v. Fujikawa* (9th Cir. 1987) 871 F.2d 1427 at 1433. It should apply, it does apply, and plaintiff is estopped to state otherwise.

2. The Memorandum Produces Grotesquely Aberrational Results

The Memorandum sustains a summary, even arbitrary, decision of the District Court that the active and protesting Char Yigh does not exist, and cannot defend, to the great damage of Char Yigh, of its bondsman and of the intention of the Federal Rules that "All pleadings shall be construed as to do substantial justice": F.R.Civ.P. 8(f).

The Memorandum allows Interpool to collect $1 million from Char Yigh even though it wrongfully sued Char Yigh in 1984, and was compelled to dismiss Char Yigh *with prejudice* in 1991. The Memorandum will allow Interpool to recover the $1 million plus eleven years of interest even though in July 1984, one month before initiating this lawsuit, Interpool recovered judgment against the C.C. Line defendants in New York for breach of the very same contract, and is wholly and utterly barred under the substantive doctrine of merger by judgment from any recovery whatsoever in the present action.[7] Indeed, the Southern District of New York judgment has been satisfied, so that Interpool cannot even allege residual damages.

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[7] Merger by judgment is an absolute defense — *Mirin v. State of Nevada* (9th Cir. 1976) 547 F.2d 91, 94; *Eichman v. Fotomat Corp.* (9th Cir. 1985) 759 F.2d 1434, 1438.

A greater miscarriage of justice than a Court deliberately overlooking merger by judgment cannot be envisaged in a civil case, unless it is that the second, merged judgment be entered against a non-defendant: Char Yigh was dismissed as a defendant in November 1991 — yet judgment was entered against it in January 1992, and expressly confirmed in the Memorandum.

Finally, the Memorandum itself violates the same panel's own earlier, written, interlocutory opinion in this case — "Char Yigh was dissolved while this action was pending (Panamanian law allows the continued defense of litigation after dissolution) and thus has no assets with which to increase Interpool's attachment security." [8] This ruling has not been stricken, and is still the official, published law of the Ninth Circuit. Thus, the panel's own memorandum decision violates the fundamental and salutary principle of *res judicata*: *Federated Department Stores v. Moitie* (1981) 452 U.S. 394, 101 S.Ct. 2424, 63 L.Ed.2d 103. Char Yigh is in the anomalous position of having established a clear precedent that Panamanian law allows the continued defense of litigation after dissolution, while being barred by purely arbitrary rulings from invoking its own precedent.

With the latest version of a Not For Publication Memorandum at odds with an earlier published interlocutory appeal, and with the Memorandum at odds with the Ninth Circuit's own *Acme Granite* opinion and the *Hilbrands* opinion, we are caught in a never ending circle of contradiction. The circle will become larger when plaintiff's counsel in the *Crescent* case invokes the Not for Publication Memorandum against Char Yigh as collateral estoppel. The Circuit must either adopt its

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[8] *Interpool, Ltd. v. Char Yigh Marine (Panama) S.A.* (9th Cir. 1989) 890 F.2d 1453, 1457.

published reasoning and so contradict its Not for Publication Memorandum, or adopt the Memorandum and contradict its reported authority in deciding the *Crescent* case.

The panel will have reached this position of contradicting itself in its determination to sustain the glaring error of a distinguished District Judge. In order to do so, it has ignored its own prior opinion in this case, has ignored four-square prior opinions of other panels, has disregarded a Federal Rule of Civil Procedure that is exactly on point, and has embraced wholeheartedly the most technical of technical traps, a belated claim of lack of capacity.

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper outcome on the merits.' "

Foman v. Davis (1962) 371 U.S. 178, 181, 9 L.Ed.2d 222, 83 S.Ct. 227.

CONCLUSION

This honorable Court is requested to issue its writ of mandamus to the United States Court of Appeals for the Ninth Circuit to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the Ninth Circuit to vacate its Not for Publication decision of March 8, 1995, and to reconsider the issues in this case in light of Federal Rule of Civil Procedure 25(c) and published precedent.

In the alternative, this honorable Court is requested to issue its writ of certiorari to the same court, identifying Interpool Limited as respondent.

Dated: June 9, 1995.

Respectfully submitted,

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